72-1545

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MAY 16

MICHAEL RODAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1545

CLARENCE B. BARRETT,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO.

CLARENCE B. BARRETT,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Your Petitioner, Clarence B. Barrett, respectfully prays that a writ of certiorari issue to review the judgment without opinion of the United States Court of Appeals for the Fifth Circuit rendered on March 21, 1973, and entered on April 16, 1973, which judgment affirmed the conviction of Clarence B. Barrett for the conviction of the crimes of willfully and knowingly concealing, possessing, and transporting non-taxpaid distilled spirits.

OPINION BELOW

The opinion and/or judgment of the United States Court of Appeals for the Fifth Circuit is unreported and is printed in Appendix A hereto, infra, page A1, A5. The order of the United States Court of Appeals for the Fifth Circuit that denied the petition for rehearing is printed in Appendix A hereto, infra, page A3. The order of the United States Court of Appeals for the Fifth Circuit that denied Petitioner's stay of mandate is printed in Appendix A hereto, infra, page A4.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered on March 21, 1973, and entered on April 16, 1973, and appears in the Appendix hereto. Rehearing was denied on April 16, 1973, and appears in the Appendix hereto.

The statutory provision believed to confer jurisdiction upon this Court to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered on March 21, 1973, is 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not State Police Officers can arrest solely for traffic violations and conduct a warrantless search of an automobile located off the public highway while having the owner and sole occupant in custody where the search is not incident to arrest?

2. Whether or not under the standards of Cooledge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022 probable cause existed for

conducting a warrantless search where the record established there was no necessity for searching Petitioner's automobile?

3. Whether or not the Petitioner's constitutional right of privacy has been invaded where there was an absence of need for governmental action?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Article III:

> "Section 1. The judicial power of the United States, shall be vested in one Supreme Court, ..."

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment V:

> "No person. . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

Constitution of the United States, Amendment XIV:

> ". . . nor shall any State deprive any person of life, liberty, or property, without the due process of law. . ."

United States Code, Title 28, Sec. 1254(1):

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party of any civil or criminal case, before or after rendition of judgment or decree;"

STATEMENT OF THE CASE

Petitioner was charged under a two count indictment with violations of federal internal revenue laws 26 U.S. Code Anno. Sec. 5601 (a)(12), Sec. 5205 (a)(2) and Sec. 5604 (a)(1). The gravament of the offense is willfully and knowingly concealing, possessing and transporting 40 gallons of non-taxpaid distilled spirits.

Petitioner was arraigned before the United States District Court for the Northern District of Georgia at which time, he filed written motions to suppress, quash, and dismiss. Petitioner waived trial by jury and after the United States rested, Petitioner made a motion for judgment of acquittal. The trial court overruled all Petitioner's motions and Petitioner was convicted and sentenced to two years.

The trial court's order sets out all findings of facts (R - 26 through R - 28) giving rise to the warrantless search of Petitioner's automobile trunk containing the contraband. The trial court found that this "was not a search pursuant to a warrant nor was it a search incident to a legal arrest."

Petitioner's appeal to the United States Court of Appeals for the Fifth Circuit was denied on March 21, 1973, and entered on April 16, 1973.

Petitioner has strenuously argued below that State Police officers, after arresting solely for traffic violations can not (where not incident to arrest) conduct a warrantless search of Petitioner's automobile located off the public highway, while having the owner and sole occupant in custody. In the alternative, Petitioner argued below that if State Police Officers can search the automobile without warrant and without consent (where not incident to arrest) probable cause did not exist under the circumstances as shown by the transcript and record.

After the Petitioner was arrested on private property, he was first handcuffed and then returned to the State Patrol car (R-27). The State trooper stated that he felt he had the legal authority to search the automobile based upon probable cause although he knew of no reason why a search warrant could not have been obtained. He knew there was no emergency and based his opinion on the erroneous legal conclusions that the search was incident to the arrest and that the Petitioner had abandoned the automobile (R-27 and R-28). The transcript shows the Petitioner had no intent to abandon his automobile, but was trying to save his automobile - and departed his

automobile on private property taking his car keys with him.

REASONS FOR GRANTING THE WRIT

I.

A CONSTITUTIONAL STANDARD SHOULD BE DETERMINED FINALLY FOR THE GUIDANCE OF INFERIOR COURTS WHERE WARRANTLESS SEARCHES OF AUTOMOBILES ARE CONDUCTED ON PRIVATE PROPERTY THOUGH NOT INCIDENT TO ARREST WHILE THE OWNER IS IN POLICE CUSTODY FOR TRAFFIC VIOLATIONS.

In the leading case of Carroll v. U. S., 267 U. S. 131 (1925), this Court held that a search of a motor vehicle without a warrant is unreasonable if made without probable cause and the evidence of contraband liquor seized after interception and search of an automobile without warrant is inadmissible and in violation of the Fourth Amendment.

A general exploratory search is not justified on an arrest for a mere traffic violation, U. S. v. Adams, 424 F. 2d 175 (1970); U. S. v. Jones, 452 F. 2d 884. A search of an automobile of a motorist arrested for a traffic violation cannot justify a search without warrant where the arresting officer detects the odor of intoxicants. Roberts v. State, 483 P. 2d 338. Odors do not authorize a search without warrant, Johnson v. U. S., 33 U. S. 10 (1947). Had the arresting officer attempted to secure a warrant to establish probable cause for the issuance thereof a strong showing of odor plus additional strong factors would have been necessary. U. S. v. Gillette, 383 F. 2d 843 (1967); Monnette v. U. S., 299 F. 2d 847 (1962). Chase is too weak a circumstance to justify a search without warrant where there is ample

time to acquire same. Carter v. U. S., 314 F. 2d 386 (1963). The legal arrest of a person should not destroy his privacy. U. S. v. Deleo, 422 F. 2d 487.

A constitutional standard whereby inferior courts can balance the extent of the invasion of privacy against the need for governmental action is needed to guide the inferior courts in determining the validity of warrantless searches.

II.

THE DECISION BELOW IGNORES AND FAILS TO FOLLOW THE CLEAR MANDATE ANNOUNCED IN COOLEDGE V. NEW HAMPSHIRE, SUPRA.

Searches conducted outside the judicial process, without prior approval by judge or magistrate are "per se" unreasonable subject only to a few specifically established and will delineated exceptions. Cooledge v. New Hampshire, 403 U. S. 443, 91 S. Ct. 2022 (1972). In Cooledge even specific exceptions for automobile searches without warrants are inapplicable when the police could have secured a warrant well in advance of the search.

The United States Court of Appeals for the Fifth Circuit has affirmed the lower district court on the Chambers ruling. In Chambers, police officers had stopped an automobile, arrested the occupants and after taking the automobile and occupants to the police station, searched the automobile. The warrantless search was justified by this Court on the basis of probable cause rather than as incident to an arrest in that very strong factors of probable cause existed that the occupants had committed a robbery.

Mr. Justice Harlan in his dissenting opinion in Chambers stated:

> "In sustaining the search of the automobile, I believe the Court ignores the framework of our past decisions circumscribing the scope of permissible search without a warrant. The Court has long read the Fourth Amendment's proscription of 'unreasonable' seizures as imposing a general principle that a search without a search warrant is not justified by the mere knowledge by the searching officers of facts showing probable case. The "general requirement that a warrant be obtained" is basic to the Amendment's protection of privacy, and "the burden is on those seeking [an] exemption . . . to show the need for it".

For the transparent reluctance of the United States Court of Appeals for the Fifth Circuit to follow the clear mandate of Cooledge and in the exercise of supervisory powers over inferior courts, certiorari is due to and ought to issue to revise and review the judgment below.

III.

THIS COURT SHOULD NOW SET A PROSPECTIVE CONSTITUTIONAL STANDARD FOR INFERIOR COURTS TO FOLLOW WHERE UNNECESSARY AND EXTREME GOVERNMENTAL INTRUSIONS ON INDIVIDUAL'S PRIVACY ARE CONSUMATED THOUGH LESS DRASTIC MEANS EXISTS TO ACHIEVE THE SAME END.

Mr. Justice White in delivering this Court's opinion in Chambers v. Maroney, 399 U. S. 42, 26 L. Ed. 2d. 419, 90 S. Ct. 1975

(1970) stated:

> "Arguably because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater", but, which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. . ."

The tremendous value our society places on privacy, indicates that intrusions should take place only when "necessary". Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684 (1961); Weeks v. United States, 232 U. S. 838 (1914). The intrusion from the execution of a warrant -- a paramount concern of the Founding Fathers -- is simply "unnecessary" where "less drastic means" exists to achieve the same end. Can warrantless intrusions be less unnecessary?

This Court stated in Mapp at 652 that without the exclusionary rule in unreasonable searches and seizures . . . "the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty'.

The Mapp "exculsionary" rule must be amplified and now extended to unnecessary and extreme governmental intrusions where less drastic means exists to achieve the same end.

CONCLUSION

To implement fundamental constitutional guarantees a writ of certiorari is due to be and ought to issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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CERTIFICATE OF SERVICE

I, E. Lamar Gammage, Jr., attorney for Clarence B. Barrett, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of May, 1973, I served three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit as follows:

By mailing in the United States mail, three copies of same in a duly addressed envelope with first class postage prepaid to the Honorable Erwin N. Griswold, Solicitor General for the United States of America, Department of Justice, Washington, D. C. 20530.

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Printed copies mailed:

May 15, 1973

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72 - 3523

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CLARENCE B. BARRETT,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

---

(March 21, 1973)

Before THORNBERRY, GOLDBERG and RONEY,

Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.1 See Chambers v. Maroney, 1970, 399 U. S. 42.

A 2

Clerk, U. S. Court of Appeals,
Fifth Circuit
By Maryette K. Failey
Deputy

New Orleans, Louisiana
April 26, 1973

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72 - 3523
Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CLARENCE B. BARRETT,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION FOR REHEARING

(APRIL 16, 1973)

Before THORNBERRY, GOLDBERG and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72 - 3523

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CLARENCE B. BARRETT.

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

---

ORDER.

IT IS ORDERED that the motion of Appellant filed in the above styled and numbered cause for a stay of the issuance of the mandate pending his petition for writ of certiorari in this cause be, and the same is hereby DENIED. See Fifth Circuit Local Rule 15. as amended January 11. 1971.

/s/ Homer Thornberry
UNITED STATES CIRCUIT JUDGE

A 5

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1972

No. 72-3523

Summary Calendar

D. C. DOCKET No. 6043

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CLARENCE B. BARRETT,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

Before THORNBERRY, GOLDBERG and RONEY,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of said District Court in this cause be, and the same is hereby, affirmed.

March 21, 1973

Issued as Mandate: April 26, 1973.

A true copy
Test: EDWARD W. WADSWORTH

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1545

CLARENCE B. BARRETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the warrantless search of his vehicle at the time of his arrest was not incident to his arrest and was not based on probable cause.

After a jury waived trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of concealing forty gallons of non-taxpaid liquor, in violation of 26 U.S.C. 5601(a)(12), and of possessing and transporting said liquor, in violation of 26 U.S.C. 5205(a)(2) and 5604(a)(1). He was sentenced to imprisonment for two years. The court of appeals affirmed without opinion (Pet. App. A).

The district court found that the arresting officers, troopers of the Georgia Highway Patrol, were conducting a routine road check for driver's licenses, inspection stickers, etc., and that traffic was backed up along the highway at the checkpoint. The officers observed petitioner's vehicle approach the end of the line of traffic, make a sudden U-turn in the road, and proceed down the

highway in the opposite direction in a reckless and dangerous manner. An officer pursued the vehicle with his red light flashing and the vehicle suddenly turned off the highway onto a dirt road. After a short distance the car stopped, and petitioner emerged and fled through the woods, refusing to halt on demand. He was finally arrested in the yard of a nearby residence, at which time he stated, "You've got me. I'm loaded." He was then given a *Miranda* warning and taken back to the car, at which time he advised the officer that there was whiskey in the trunk of the car. The officer could, moreover, smell the whiskey. The officer thereupon obtained the keys to the car and opened the trunk, finding the 40 gallons of non-tax-paid whiskey (C.A. App. 14-16).[1] These factual findings of the district court are not disputed.

On the basis of the foregoing facts, the court was correct in denying the motion to suppress. Petitioner's precipitate flight, his statements to the officer, and the aroma of whiskey emanating from the trunk of the car created strong probable cause to believe petitioner guilty of the offenses for which he has been convicted, thereby justifying the search of petitioner's automobile under well established principles. See *Chambers* v. *Maroney*, 399 U.S. 42; *United States* v. *Edwards*, 441 F. 2d 749 (C.A. 5); cf. *Cady* v. *Dombrowski,* No. 72-586, decided June 21, 1973.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

July 1973

[1] "C.A. App." refers to the appendix in the court of appeals, a copy of which we are lodging with the Clerk of this Court.